Supreme Court, U.S.
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No. 99-973

In The

Supreme Court of the United States

JOHN BAKER,

Petitioner,

v.

ANITA JOHN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent does not deny that after a hearing at which she and petitioner were represented by counsel and both testified the Alaska Superior Court determined that it was in the best interest of Emmanuel and John Baker Jr. that petitioner have custody of both children because respondent "drinks every couple weeks," "always drinks until she blacks out," and "drinks when the children are around." App. 189.

Respondent does not deny that in *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32, 41 (Alaska 1988), the Alaska Supreme Court concluded that Congress to that date repeatedly had "demonstrated its intent that Alaska Native communities not be accorded sovereign tribal status." Respondent does not deny that in this action the Alaska Supreme Court reaffirmed its decision in *Native Village of Stevens* and then held that "[p]rior to 1993, no . . . recognition of Alaska villages [as 'federally recognized tribes'] had occurred." App. 18. Nor does respondent contest the fact that neither Northway nor any other Native village on Assistant Secretary of the Interior for Indian Affairs Ada Deer's 1993 list petitioned Assistant Secretary Deer for recognition as a "tribe" as her regulations required.[1]

Those facts in and of themselves demonstrate that the Alaska Supreme Court wrongly decided the questions

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[1] Like every executive branch official, Assistant Secretary Deer was required to comply with her own regulations. *See e.g., Service v. Dulles*, 354 U.S. 363 (1957) (personnel action taken by Secretary of State in violation of Department of State regulations unlawful).

presented in the petition.[2] The Alaska Supreme Court's decision also conflicts with numerous relevant decisions of this Court, and implementation of the decision, first in Northway and then in more than 200 other Native villages, will have significant adverse consequences for Emmanuel and John Baker Jr. and thousands of other Native children, and, as Chief Justice Matthews has

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[2] Respondent asserts that the Tlingit and Haida Status Clarification Act (THSCA), which the 103d Congress enacted as Title II of the statute, Pub. L. No. 103-454, in which the Federally Recognized Indian Tribe List Act (FRITLA) was enacted as Title I is evidence that the 103d Congress intended FRITLA to ratify Assistant Secretary Deer's *ultra vires* action. *See* Brief in Opposition to Petition, at 15. However, the bill that became THSCA was introduced by Alaska Senator Frank Murkowski to allow the Tlingit-Haida Central Council to resume contracting with the Bureau of Indian Affairs (BIA) pursuant to the Indian Self-Determination Act. As Senator Murkowski explained when he introduced it: "The bill does not do anything new. The bill makes a technical correction to BIA's list and *should not be viewed as setting any precedent for Federal recognition of a tribe.* My bill simply restores the status quo of October 20, 1993. . . . " (emphasis added). 139 CONG. REC. 32428 (1993). That objective is consistent with the position Senator Murkowski and the other members of Alaska's congressional delegation have held since Native sovereignty became an issue in Alaska in the 1980s. *See e.g., Amendments to the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act and to Establish a Memorial in the District of Columbia: Hearing on S. 485, et al., before the Subcomm. on Public Lands, Reserved Water and Resource Conservation of the Senate Comm. on Energy and Natural Resources,* 99th Cong. 3 (1986) (statement of Senator Murkowski that "I will not support any legislation which leads to the creation of a series of independent sovereign entities in Alaska").

expressed the concern – *see* App. 63-64, for the future of Alaska as a cohesive civil society.[3]

As frequently occurs at the certiorari stage when no colorable objection to a petition can be made on the merits, respondent has concocted procedural objections that she hopes will persuade the Court to deny plenary review. And the governor of Alaska, appearing as amicus curiae on behalf of respondent, urges the Court to deny review because, as a policy matter, "the State . . . welcomes the resolution that [the Alaska Supreme Court's decision] brings to State-Tribal relations in Alaska." Brief for the State of Alaska, at 3.

However, respondent's procedural objections are devoid of merit. And the Court should evaluate the governor's recommendation by placing his opposition to plenary review in its proper context.

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[3] The intrusion into this action by the amici curiae that appeared before the Alaska Supreme Court on behalf of respondent validates Justice Matthews' concern that respondent's objective in this action is not protection of the best interests of Emmanuel and John Baker Jr. and other Native children, but rather the imposition of a new federal Native policy in Alaska by *ultra vires* agency action and judicial fiat. In addition to the "State of Alaska" (about whose appearance here more will be said), amici included the BIA (appearing through the Department of Justice), the Native Village of Venetie (the losing respondent in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998)), the Alaska Inter-Tribal Council (an umbrella organization that spearheads the Native sovereignty movement in Alaska), and the Paskenta Band of Nomlaki Indians, the Scotts Valley Band of Pomo Indians, and the Death Valley Timbisha Shoshone, who appeared because they aspire to exercise the same jurisdiction in California that, unless reversed by this Court, the Alaska Supreme Court's decision will allow 226 governing bodies of Native villages to exercise in Alaska.

The Decision of the Alaska Supreme Court is a Final Judgment for Purposes of 28 U.S.C. § 1257.

The Alaska Supreme Court decided that Congress intended to delegate the Assistant Secretary of the Interior for Indian Affairs authority to unilaterally create a "federally recognized tribe" at the village of Northway whose governing body possesses authority to create a "court" that may assert jurisdiction over petitioner and his children and exercise that jurisdiction to compel petitioner to share custody of the children with an alcoholic who engages in episodic binge drinking and in whose household one child previously was injured while playing unsupervised. The Alaska Supreme Court then remanded this action to the Alaska Superior Court to determine the state law question of whether "comity" requires the State of Alaska to assist the Northway "court" to enforce the "judgment" it has entered against petitioner.

Respondent argues that, because of the remand, the decision of the Alaska Supreme Court is not a final judgment for the purposes of 28 U.S.C. § 1257. However, respondent misunderstands the § 1257 final judgment requirement.

As § 1257 requires, the questions presented in the petition have been conclusively decided by the highest court of the State of Alaska. With respect to those questions, there is nothing more to be decided, either by the Alaska Superior Court on remand or by the Alaska Supreme Court. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975), this Court held that, for purposes of 28 U.S.C. § 1257, when the highest court of a state has conclusively decided a federal issue "the judgment of the state court on the federal issue is deemed final," even if

"there are further proceedings – even entire trials – yet to occur in the state courts. . . . " The Alaska Supreme Court's decision in this action is exactly that case.

Whether the Alaska Supreme Court conclusively decided the questions presented in the petition is to be determined by examining the entire record and considering the effect of the Alaska Supreme Court's decision under that court's rules of practice. *See Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72 (1946). The record indicates that, on remand, the Alaska Superior Court will not consider the questions the Alaska Supreme Court decided. And no matter what its outcome, the remand will not moot the controversy between the parties regarding those questions.

If petitioner prevails on the remand, the State of Alaska will not assist the Northway tribal court to enforce its "judgment". But petitioner and his children will remain subject to the jurisdiction of the Northway "court". And nothing will preclude respondent from asking the Northway "court" to enforce the "judgment" it has entered against petitioner.

In such a circumstance, under the Alaska Supreme Court's rules of practice, the doctrines of *res judicata* and collateral estoppel will preclude petitioner from challenging either the *de jure* existence of the Northway court or its authority to assert its jurisdiction over petitioner and his children. *See Bartlett v. State*, 948 P.2d 987, 991 (Alaska 1997) (*res judicata* bars a subsequent suit on the same claims between the same parties); *Rooney v. Rooney*, 914 P.2d 212, 216 (Alaska 1996) (doctrine of collateral estoppel prohibits a party in an action from litigating an issue in a second action that was decided in the first action).

The Questions Presented Are Properly Before the Court.

The Alaska Supreme Court squarely considered and explicitly decided each of the questions presented in the petition. *See* App. 11-14, 18-23. Because it did, this Court repeatedly has instructed that "it is irrelevant to inquire . . . when [the questions the Alaska Supreme Court considered and decided were] raised in a court below. . . . " *Orr v. Orr*, 440 U.S. 268, 274 (1979).

Not understanding that blackletter rule, respondent asserts that the first two questions were not raised below, and suggests that, because they were not, this Court should not review the Alaska Supreme Court's decision regarding them. However, petitioner did raise those questions below when respondent moved the Alaska Superior Court to dismiss the custody action petitioner filed in that court. Petitioner, citing *Native Village of Stevens, supra*, asserted in opposition to the motion to dismiss that the Northway village council had failed to "prov[e] that it is a self-governing tribe," and questioned the legal consequence of Assistant Secretary Deer's publication of her 1993 list. *See Baker v. John*, Alaska Superior Court No. 4FA-95-3103 CI, Supplemental Brief in Opposition to Motion to Dismiss (March 29, 1996) [hereinafter "Opposition to Motion to Dismiss"].[4]

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[4] Among the inaccuracies in her statement, respondent has represented to the Court that petitioner filed a false affidavit when he informed the Alaska Superior Court that he was "unaware of any [other] custody proceeding regarding the children . . . in Alaska, or any other jurisdiction." *See* Brief in Opposition to Petition, at 2. In fact, when she drafted his affidavit petitioner's counsel did not inform the Alaska Superior Court of the Northway "court's" "proceeding" because, as petitioner explained through counsel when he

The Recommendation of the "State of Alaska" That the Court Deny Plenary Review Should Be Considered by the Court in Its Proper Context.

Alaska is one of a minority of states in which the attorney general is appointed by and serves at the pleasure and under the direction of the governor.

Since the Native sovereignty movement began in Alaska, Alaska governors have responded in varying ways to the assertion that Native residents of more than 200 villages are "federally recognized tribes" whose governing bodies possess governmental authority, as well as sovereign immunity that permits the bodies and their business entities to disregard statutes the Alaska Legislature has enacted to protect the health, safety, and economic relations of all citizens of Alaska, including Native citizens who reside in Native villages.[5]

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opposed respondent's motion to dismiss, "[t]he Northway tribal council has not established that it is a 'court' for purposes of assuming jurisdiction over any matter, let alone the specific matter of custody. . . . " Opposition to Motion to Dismiss, at 18.

[5] In 1981 Governor Jay Hammond asked the secretary of the interior not to approve new Indian Reorganization Act constitutions. In 1984 Governor Bill Sheffield established a Task Force on Federal-State-Tribal Relations, which concluded that Native residents of Native villages were not "federally recognized tribes." *See Native Village of Stevens, supra* (discussion of Task Force report). In 1987 Governor Steve Cowper directed his attorney general to file *State of Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government* [hereinafter "*Venetie* lawsuit"], the action this Court's decision in *Alaska v. Native Village of Venetie Tribal Gov't, supra*, concluded. In part, Governor Cowper did so to establish that Native residents of Native villages were not "federally recognized tribes." *See State of Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government*, 856 F.2d

Several days after Tony Knowles, the current governor, assumed office the U. S. District Court for the District of Alaska in December 1994 issued an unpublished decision in the *Venetie* lawsuit in which the court held that the Indian residents of Venetie were a "federally recognized tribe". *Native Village of Venetie I.R.A. Council v. Alaska*, Nos. F86-0075 and F87-0051 (consolidated) (D. Alaska, Dec. 23, 1994) (Decision-Tribal Status). When the district court entered its final judgment, Governor Knowles directed his attorney general not to appeal the court's tribal status decision because, as the attorney general explained to the Alaska Legislature, "this administration has chosen not to battle over this issue" in order to "try to develop a better, happier relationship with the villages throughout Alaska." *Transcript of December 4, 1995 Hearing of Joint House and Senate Judiciary Committee*, Alaska State Legislature. And in a letter to the Legislature the attorney general reiterated that "the decision by the Knowles Administration to withdraw the challenge to federal recognition of tribes in Alaska was not driven by litigation considerations." The letter concluded with the admonition that "while people may disagree with the wisdom of this policy change, there should be no doubt

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1384, 1386 (9th Cir. 1988) (noting that the State's complaint "claimed that neither Native Village nor Venetie is an Indian tribe empowered to exercise tribal sovereignty"). Three years later Governor Cowper reversed course and issued an administrative order that announced that "[t]he State will treat as a tribe any Alaskan Native group that meets the common sense of the word." Adm. Order No. 123 (Sept. 10, 1990). But the order equivocated regarding the legal consequences Governor Cowper thought would flow from that treatment. In 1991 Governor Walter Hickel revoked Adm. Order No. 123. *See* Adm. Order No. 125 (Aug. 16, 1991).

that the Governor has the authority to adopt and implement the tribal status policy for his administration, just as his predecessors have done." Letter from Bruce Botelho, Alaska attorney general, to the Hon. Irene Nicholia (Jan. 26, 1996).

In this action, the governor directed his attorney general to inform the Court that the Alaska Supreme Court's decision "significantly advances the prospects for more cooperative, effective, and nonduplicative working relations between the state and tribal courts in Alaska." Brief for the State of Alaska, at 1. The governor was empowered to direct the attorney general to communicate the governor's view. But the doctrine of separation of powers "is implicit in Alaska's constitution." *Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976). And pursuant to ALASKA CONST., art. II, § 1, the legislative power of the State of Alaska is vested in the Alaska Legislature. And it is the Legislature's legislative power, more than it is the governor's executive power, that will be diminished if the Court denies plenary review.

Because the Alaska Legislature meets annually for a 120-day session that convenes in January, it was not in session during the thirty day period Rule 37.2(a) afforded amici curiae to appear in support of the petition. However, the governor was aware when he directed the attorney general to appear in opposition to the petition that the leaders of the Legislature strongly support the petition. *See* Letter from Drue Pearce, president of the Alaska Senate, and Brian Porter, speaker of the Alaska House of Representatives, to the Hon. Ted Stevens, Frank Murkowski, and Don Young (Dec. 15, 1999), *reprinted at* App. 1. For that reason, in the unique context of this case, the attorney general's representation to the Court that the

"State of Alaska", rather than the governor of Alaska, urges that the petition be denied is a troubling disingenuity.[6]

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BRANT MCGEE
JOHN FRANICH
DONALD CRAIG MITCHELL*

Counsel for Petitioner

* *Counsel of Record*

[6] When the Alaska Legislature convened on January 10, 2000, its leaders met to discuss the Alaska Supreme Court's decision and the governor's appearance in opposition to the petition. They decided to retain counsel to move the Court on behalf of the Legislature to accept a brief filed in support of the petition after expiration of the Rule 37.2(a) filing deadline.

Alaska State Legislature

[SEAL]

Senator Drue Pearce
President of the Senate

Representative Brian Porter
Speaker of the House

[Letterhead Omitted In Printing]

The Honorable Ted Stevens
522 Hart Building
United States Senate
Washington, D.C. 20510

The Honorable Frank Murkowski
322 Hart Building
United States Senate
Washington, D.C. 20510

The Honorable Don Young
2111 Rayburn Building
United States House of Representatives
Washington, D.C. 20515

December 15, 1999

Dear Senators Stevens and Murkowski and Representative Young:

For the past fifteen years, there has been growing controversy in Alaska regarding the questions of whether Native residents of rural villages are members of "federally recognized tribes" and whether any land in Alaska is "Indian country". The answers to those questions carry immense consequences for the continued ability of the Alaska Legislature to assert its jurisdiction throughout the expanse of Alaska in order to protect the health, safety and general well-being of all Alaskans, including Alaskans who are Alaska Natives residing in rural villages.

In 1998, in *Alaska v. Native Village of Venetie Tribal Government*, the United States Supreme Court held that Congress did not intend fee title land conveyed to native corporations pursuant to the Alaska Native claims settlement Act to be "Indian country." Yet because Governor Knowles decided that his administration would not contest the tribal status of the Native Village of Venetie, in *Venetie* the Supreme Court assumed, albeit without deciding, that the residents of Venetie were a "federally recognized tribe."

Last September, the Alaska Supreme Court announced its view. By a vote of 3 to 2, the court in *John v. Baker* held that the Athabascan residents of the village of Northway (and by inference, the Native residents of every other village in Alaska) are a "federally recognized tribe" for two reasons. First, in 1993, Assistant Secretary of the Interior for Indian Affairs Ada Deer published a list in the Federal Register that she asserted constituted federal recognition. And second, in 1994, the 103d Congress intended its enactment of the federally Recognized Indian Tribe List Act (FRITLA) to ratify Assistant Secretary Deer's action.

Because the Alaska Supreme Court decided questions of federal, rather than state law, the Office of Public Advocacy, which represents Mr. Baker, has retained Don Mitchell to petition the United States Supreme Court to issue a writ of certiorari and review the *John v. Baker* decision.

The dispute between the parties in *John v. Baker* involves a disagreement between two unmarried Native parents regarding the custody of their children. However, the

implications of the case are far broader. If Native residents of rural villages are "federally recognized tribes" for the purpose of empowering their government bodies to issue child custody decrees, they are "federally recognized tribes" for all other purposes, including sovereign immunity.

In 1996, Attorney General Botelho informed the Legislature that "[a] few native groups in Alaska have claimed sovereign immunity in response to efforts by [the Alaska Department of Environmental Conservation] to enforce the state's 'little superfund law,' AS 46.03" and that that "could be an area of dispute with tribes in the future."

The inability of the Alaska Legislature to enforce its environmental protection statues in rural Alaska is merely the tip of an ice berg of jurisdictional confusion if the United States Supreme Court does not reverse the *John v. Baker* decision. For that reason, it is our hope that the Legislative Council will appear before the Court as amicus curiae to request the Court to grant Mr. Baker's petition for certiorari. The purpose of this letter is to request that you appear, as Senator Stevens did in *Venetie*, as amici curiae to the petition for certiorari.

A brief by the three members of Alaska's Congressional delegation may be particularly influential with the Court because, more than any other members of the 103d Congress, it is your intent embodied in FRITLA that the Alaska Supreme Court has misconstrued. If the *John v. Baker* decision is correct, then with no notice either to members of the Alaska Legislature of any other Alaskans, and with no opportunity for public hearing, the members

of Alaska's Congressional delegation joined other members of the 103d Congress in enacting FRITLA by unanimous consent of the last evening of the Congress in order to create 226 "federally recognized tribes" in Alaska, each of which possesses sovereign immunity that permits its governing body and commercial business enterprises to disregard the laws of the State of Alaska.

We are confident that this was not your intent, nor was it the intent of any other member of the 103d Congress. If it was not, your request to the United States Supreme Court that it review the Alaska Supreme Court's decision in *John v. Baker* may have an important influence on the Court's decision whether to grant Mr. Baker's petition for certiorari.

Thank you for your attention to this request of considerable importance to the future of Alaska. Mr. Baker's petition for certiorari was filed on December 7. Pursuant to United States Supreme Court Rule 37.2(a), a brief by an amicus curiae must be "submitted within the time allowed for filing a brief in opposition," which is January 6, 2000.

Sincerely,

/s/ Drue Pearce
SENATE PRESIDENT

/s/ Brian Porter
SPEAKER OF THE HOUSE